DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock St., Room 250 Denver, CO 80202	DATE FILED: July 18, 2019 10:35 AM CASE NUMBER: 2019CV31577
Plaintiff: DEFEND COLORADO **v.** **Defendants: GOVERNOR JARED POLIS, and THE COLORADO AIR QUALITY CONTROL COMMISSION**	**▲COURT USE ONLY▲** Case Number: **2019CV31577** Division: **CV** Courtroom: **203**

ORDER

Plaintiff (Defend Colorado) brought a complaint for declaratory and injunctive relief and judicial review under the Colorado Administrative Procedures Act (APA) against Governor Polis (the Governor) and the Colorado Air Quality Control Commission ("the Commission"). Both the Governor and the Commission filed motions to dismiss the claims. Defend Colorado has filed a combined response and the two Defendants have replied. Having reviewed the pleadings, the Court enters the following Order:

BACKGROUND

Defend Colorado is a Colorado registered non-profit organization whose principal function is "to advocate for policies and regulations that align with the statutory mandates of the Colorado Air Act and Clean Air Act". Its members are businesses and industry groups that are affected or subject to these acts. As such, they were and are concerned with the nonattainment designation of the state as this designation could affect the nature and regulation of the businesses in the future.

A nonattainment designation is a designation concerning the ability of the air of the state or region to meet national ambient air quality standards set by the EPA for different air pollutants including ozone. Under the Clean Air Act, each state is required to implement air quality controls designed to ensure that they meet or do not exceed these standards. When the standards are set, each state must determine the amount of time they need to attain the standards and follow certain regulatory reporting to provide progress toward that goal and submit data to certify their air quality and the accuracy of that data. Areas may be classified as Marginal, Moderate, Serious, Sever, and Extreme. Each classification gives an attainment date standard based upon the class.

In 2012, the Denver Metropolitan/North Front Range was designated a "moderate" nonattainment area based upon the 2008 ozone standards. Because the region had not met the standards, the moderate designation created a deadline for attainment of the goal of six years or July 20, 2018. For attainment to be reached on that date, the EPA would evaluate annual daily maximum 8-hour concentration of ozone data collected over all monitors and averaged for two three-year periods, the periods of 2012 to 2014 and 2015 to 2017. On June 4, 2018, the Colorado Department of Public Health and Environment ("CDPHE") submitted data to the EPA showing that it had met the standards for ozone in 2017 and requested an extension on the attainment date for one year. The EPA received this extension and proposed to approve it but has not done so.

Each year, Colorado must submit quarterly data of recorded levels of ozone at all monitoring stations to the EPA. Further, Colorado must annually certify that the previous years data have been submitted and that the data is accurate. The parties differ on the objective or significance of this certification.

40 C.R.F. §58.15 states:

(a) The state, or where appropriate local, agency shall submit to the EPA Regional Administrator an annual air monitoring data certification letter to certify data collected by FRM, FEM, and ARM monitors at SLAMS and SPM sites that meet criteria in appendix A to this part from January 1 to December 31 of the previous year. The head official in each monitoring agency, or his or her designee, shall certify that the previous year of ambient concentration and quality assurance data are completely submitted to AQS and that the ambient concentration data are accurate to the best of her or his knowledge, taking into consideration the quality assurance findings. The annual data certification letter is due by May 1 of each year.

(b) Along with each certification letter, the state shall submit to the Regional Administrator an annual summary report of all the ambient air quality data collected by FRM, FEM, and ARM monitors at SLAMS and SPM sites. The annual report(s) shall be submitted for data collected from January 1 to December 31 of the previous year. The annual summary serves as the record of the specific data that is the object of the certification letter.

(c) Along with each certification letter, the state shall submit to the Regional Administrator a summary of the precision and accuracy data for all ambient air quality data collected by FRM, FEM, and ARM monitors at SLAMS and SPM sites. The summary of precision and accuracy shall be submitted for data collected from January 1 to December 31 of the previous year.

Thus, under the statute, the certification letter is only a statement from the state agency that the data is accurate and precise as well as a summary report of the data for that year. While the certification and its associated summary become a record of the EPA for the relevant year, they do not necessarily displace the raw data collected and submitted by the state, nor do they include previous years readings or summaries. The Certification letter is also not the vehicle for reporting exceptions to the monitoring requirements.

If a state exceeds the ozone standard due to "exceptional events" such as forest fires or other causes, they may inform the EPA and request mitigation for the

exceedance in future determinations or designations. The process for doing so is described in 40 C.F.R. §50.14(c). If a state chooses to flag such data for consideration, it must provide notice and public comment. *Id.* at §50.14(c)(3). Similarly, a state can alert the EPA to situations in which it would have met the standards but for the inclusion of international emissions flowing over/into the state. 42 U.S.C.A. §7509a(b). This, however, is implemented through the site implementation plan, not through submission of the data or certification thereof. At issue here is that Colorado (at the Governor's direction) has chosen not to request mitigation for exceptional events and to not alert the EPA about international emissions contribution to the state's ozone readings. As Defend Colorado has noted, such events and emissions may be directly affecting the ozone readings and the decision not to report these avoids potential mitigation, without which the EPA could raise the attainment designation from moderate to severe. Such a change has not occurred to date.

In the complaint, Defend Colorado states generally:

> "This action seeks to compel the Commission to meet its obligations under the Colorado Air Act to hold a public hearing to develop the most accurate and complete inventory of air pollution sources that affect air quality in the State of Colorado possible, based on the best available science and data, and seeks a declaration that Governor Polis unlawfully interfered in the Commission's statutory obligations under the Colorado Air Act."

Complaint at Par. 2.

Particularly, Defend Colorado filed a petition with the Commission requesting that the Commission "comply with its statutory duty to develop an emissions inventory that accurately accounts for emissions from all pollution sources, hold a public hearing to collect and evaluate the best available science and data, and to include that complete and accurate inventory in Colorado's May 1, 2019 certification to EPA". While the Commission was considering the petition, the Governor directed

CDPHE not to investigate or submit any information concerning the contribution of international emissions or exceptional events and to oppose the petition. The Commission subsequently found that Defend Colorado lacked standing to seek such relief and declined to rule on the petition. Defend Colorado submitted an Emergency Motion to Reconsider to clarify the finding of lack of standing and again requesting a public hearing on the matter. The Commission denied that motion without clarification. On March 26, 2019 the Governor issued a letter to the EPA withdrawing Colorado's request for extension.

While the first claim of Defend Colorado is broadly written to describe the lack of consideration of all relevant information including international emissions and exceptional events and to consider such before issuing a certification, Defend Colorado does not challenge the decision not to hear the petition. The actual claim is that the Commission acted improperly by not holding a public hearing in advance of its denial. While interwoven for the purposes of demonstrating why a hearing was mandated or desired, the actual "appealed decision" is whether a hearing had to be held, not the wisdom of the decision.

Similarly, the second claim is written to appear that the Commission violated its duties under the Clean Air Act by allowing the certification to be submitted without the most accurate inventory of air pollution sources possible (i.e. that the Commission ignored the international emissions and exceptional events). However, again, the actual decision to be evaluated is whether not holding a public hearing prior to failing to reconsider the petition. Both claims are premised under the Court's oversight of administrative decisions pursuant to the APA.

The third and fourth claims for relief allege improper influence by the Governor on the Commission in its fulfillment of duties under the Clean Air Act and violation of the separation of power by the Governor by usurping the role of the Commission by issuing a withdrawal letter to the EPA concerning the attainment

date extension. The claims are couched to include untoward influence by the Governor on the commission. These claims are presumably sought as relief under Rule 106 and 57.

The Commission responds that, like the underlying petition, Defend Colorado lacks standing to ask this Court for relief, that they have failed to state any cause of action, and that they cannot ask this Court for declaratory relief pursuant to Rule 57. They request dismissal of the First, Second and Third Claim. The Governor moves under C.R.C.P. 12 to dismiss the Third and Fourth claim for lack of standing, failure to state a plausible claim, failure to accurately plead, impossibility, and lack of Rule 106 review of an executive action.

ANALYSIS

Defend Colorado's Standing on Claims One and Two

Whether standing exists to demand a public hearing from an interested group has been discussed under prior precedent; *Colo. Oil and Gas Cons. Com'n v. Grand Valley Citizens Alliance*, 279 P.3d 646 (Colo. 2012). In that case, the Supreme Court ruled that the Commission's rules did not entitle a citizen's group to a hearing on specific permitting issues because they are not one of the enumerated persons able to request a hearing. *Id.* at 649. That is, a permitting decision or the application thereto was not a rule, regulation or order which would have allowed for a requested hearing. In permitting decisions, the Commission would have the *discretion* to consider on a citizen's group challenge but *are not bound to do so* and the citizens group loses no right when the Commission issues a permit in reliance or with a lack of reliance on their concerns.

Defend Colorado contends that the erroneous conclusion of the Commission concerning their standing in the administrative proceeding cannot be used to deny

them standing under the APA. Contrary to the Defend Colorado's argument, that is, in essence, what *Grand Valley* says. Defend Colorado ignores the fact that the granting or denial of the petition is "justiciable" only pursuant to statutory grant. That is, if the law (in this case petition rules, procedure and structure) do not allow them a right to request a hearing from the Commission, the APA does not create one after the fact. An APA claim for these denials could only be filed by the one with the right to petition for a hearing in the first place. Thus, standing is not conferred by the denial unless the Commission's standing determination was wrong. If so, they may have standing. If not, they lack standing in that forum as well as this one. Merely being a "person" under the APA does not create standing. *Board of Comm'rs of Boulder County v. Broomfield,* 7 P.3d 1033, 1036 (Colo. App. 1999).

"Whether a particular plaintiff has standing to invoke the jurisdiction of the courts is a preliminary inquiry designed to ensure that the judicial power is exercised only in the context of a case or controversy. The resolution of standing issues requires a court to determine, based primarily upon the allegations contained in the complaint, "(1) whether the plaintiff was injured in fact [and] (2) whether the injury was to a legally protected right."
Colorado Gen. Assembly v. Lamm, 700 P.2d 508, 515–16 (Colo. 1985).

C.R.S. § 25-7-110 states:

"Prior to adopting, promulgating, amending, or modifying any ambient air quality standard authorized in section 25-7-108, or any emission control regulation authorized in section 25-7-109, or any other regulatory plans or programs authorized by sections 25-7-105(1)(c) or 25-7-106, the commission shall conduct a public hearing thereon as provided in section 24-4-103, C.R.S. Notice of any such hearing shall conform to the requirements of section 24-4-103, C.R.S., but such notice shall be given at least sixty days prior to the hearing, and shall include each proposed regulation, and shall be mailed to all

persons who have filed with the commission a written request to receive such notices."

The complaint alleges that the Commission needed to hold a hearing prior to the May 1, 2019 Certification will "amend[], or modify[] . . . ambient air quality standard[s] . . . emission control regulation[s] [and] . . . regulatory plans or programs" under Colorado's Air Act pursuant to C.R.S. § 25-7-110. Complaint Para. 149. It further alleges "Colorado's May 1, 2019 certification to EPA will also "require[e] compliance in this state with any ambient air quality standard or emission control regulation" pursuant to C.R.S. § 25-7-124(3)." Complaint Para. 150. Finally, the complaint alleges that the Commission is required to hold a hearing even absent Defend Colorado's petition prior to the issuance of the May 1, 2019 certification. The dilemma, however, is that the Commission does not appear to have any statutory or regulatory involvement in the creation, transmission, ratification, or manipulation of the certification at all.[1]

Both the Commission and the Governor have discussed this at length in the portions of their motions concerning injury-in-fact of Defend Colorado. However, the Court cannot find that the Commission has any oversight authority concerning the certification at all. Regardless of what the certification does or can do, the certification is a ministerial function of CDPHE and not governed by managing or supervision of the Commission. Quite simply, the certification requirement is a constraint *on* Colorado *by* the federal government. It is not part of Colorado's air program over which the Commission has authority, but a requirement of Colorado to comply with the federal regulatory scheme. Assuming *arguendo* that the Commission held a hearing, was convinced that Defend Colorado's position was entirely correct, and ordered CDPHE not to issue the certification, then the commission would have

[1] Attempting to classify the certification as an agreement with the EPA is completely without merit. An agreement requires input from both parties and the certification is a one-directional assertion by Colorado verifying their data, not an agreement between Colorado and the EPA.

exceeded its authority in doing so and Colorado (through CDPHE or the Governor) would be free to ignore that order.

Because the petition was requesting the Commission to do something it could not even if granted, Defend Colorado cannot now claim it has lost a right by having the Commission deny that same petition without hearing. Attempting to boot-strap a new duty on the Commission in the general guise of such request touching their overall purpose would be equivalent to opening the Commission to review for any other air quality considerations, state or federal, currently supervised by CDPHE that Defend Colorado disagreed with.

With that, the Court finds that there was no injury to a "legally protected right" of Defend Colorado and thus, they do not have standing to assert Claims One and Two. As such, this Court is without jurisdiction to hear those claims as contemplated by C.R.C.P. 12(b)(1).[2]

Legal Impossibility of Claims Three and Four

Similarly, Defend Colorado has also claimed that the Governor violated the separation of powers and improperly influenced the Commission in its decision to deny the petition. In fact, they claim that the Governor usurped their role in connection to the certification letter. This argument suffers the same fate for a

[2] While the Court finds that Defend Colorado has had no injury to a legally protected right, the Court also finds that the "injury" claimed, a change in the attainment designation has further not actually happened and will not without further federal involvement. This is important because, having determined that the claims cannot stand does not leave Defend Colorado without recourse. Submission of the current certification and refusal of Colorado to seek an extension does not *per se* lead to a change of classification as Defend Colorado Asserts. It is the federal government's determination based on the certification letter and all the prior data that could reclassify. Defend Colorado gains immediate standing if the EPA chooses to reclassify, merely in another venue. However, at that time an injury will have been realized and a final agency decision will be reviewable.

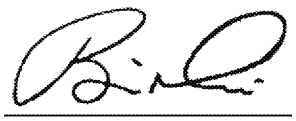
related reason. As a ministerial duty, the certification requirement is in the province of the Governor's executive function vis-à-vis the CDPHE. Any action taken by the Governor concerning its issuance or content cannot be in violation of separation principles or in any way influencing a body that has no participation in its origin, content, or issuance of the certification in any event. As noted in *State Highway Comm'n of Colo. v. Haase*, 537 P.2d 300 (Colo. 1975) and *Adarand Constructors v. Owens*, 2000 WL 490690 (D. Colo. Apr. 24, 2000), a Governor who "attempts to influence" any commission such as the Commission here by contacting or otherwise restricting their duties simply cannot under the law. Such actions would have no legal effect and, therefore, can have no influential effect. Had the Commission granted the petition and ordered the CDPHE to issue something other than what the Governor commanded, it would have been the Commission that usurped the Governors role concerning the certification. The converse is not true. While it is not improbable that the Governor could influence the Commission, he legally cannot do so when it is within his power and within his sole power (either directly or through the CDPHE) to act and not the function of the Commission to fulfill. The Commission could choose to listen to the Governor or not listen and the outcome would be the same as they are independent of the Governor to the extent that they are granted power. Nothing in the complaint suggests that the Governor influenced or didn't influence them in this decision, just that the Governors actions happened contemporaneously. This is not enough to state a claim for either undue influence or a violation of the separation of powers.

Considering this, the Court finds that the Plaintiff can prove no set of facts in support of its claims that would entitle it to relief because the actions complained of by the Governor cannot, under law, influence the Commission. Further, the actions taken do not violate the separation of powers since the actions were direct powers granted to the Governor. Thus, the Third and Fourth Claim cannot legally stand as Defend Colorado has not stated a claim on which relief can be granted pursuant to C.R.C.P. 12(b)(5).

Wherefore, the combined efforts of the Governor's and the Commissions' Motions are granted, and the Plaintiff's claims are dismissed.

So ordered this 18th day of July, 2018.

BY THE COURT:



Brian R. Whitney
District Court Judge